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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1255

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES J. ASH, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Pet. App. A)[1] are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1972 (Pet. App. C). The petition for

[1] "Pet. App." refers to the appendix of the government's petition for a writ of certiorari; "S.App." refers to the appendix contained in our supplemental memorandum.

a writ of certiorari was filed on March 31, 1972, and was granted on June 12, 1972 (App. 133). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Sixth Amendment, a defendant in a criminal case is entitled to the presence of counsel at a pre-trial showing of photographs to prospective witnesses.

STATEMENT

After a jury trial with one Bailey in the United States District Court for the District of Columbia, respondent was convicted in May 1968 on five counts charging him with having participated in the armed robbery of a federally insured bank on August 26, 1965 (18 U.S.C. 2113(a); 22 D.C. Code 2901).[1] He was sentenced to imprisonment for five to fifteen years. The court of appeals sitting *en banc* reversed the conviction 5-4, on the ground that respondent had been denied his Sixth Amendment right to counsel at a showing of photographs by an F.B.I. agent to prospective witnesses after indictment and shortly before the trial.

1. On August 26, 1965, a gunman entered a branch office of the American Security & Trust Company in the District of Columbia. He waved his gun into the air and ordered everyone not to move. Sec-

[1] Bailey was acquitted by the court after the jury failed to return a verdict.

onds later another man dashed through the bank lobby to the tellers' cages, scooped up some money, and ran out, followed by the gunman. Both the gunman and his accomplice wore stocking masks which covered portions of their faces. The robbery lasted three or four minutes (App. 78-79, 85-86, 89, 91-92, 97-98).

On February 3, 1966, F.B.I. agents interviewed three individuals, Mrs. Paugh, Mrs. Major, and Mr. Taylor, who were eye-witnesses to the robbery, and Mrs. Apple, who had been seated in a car outside the bank and who had seen the robbers unmasked before they entered and after they left the bank (App. 11). At the time of these interviews no arrests had been made. The agents showed each of the witnesses five black and white facial "mug shots" of Negro males, of approximately the same age, height and weight (App. 12). Each of the four witnesses selected the photograph of respondent as the gunman, although none of the witnesses was positive about the identification (App. 11, 50).[3] Only Mrs. Apple selected a photograph of Bailey as the accomplice (App. 11, 50).

The trial began on May 8, 1968.[4] On the day be-

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[3] Apparently, respondent's photograph was included because of information received from an informant (Pet. App. A, 4a-5a).

[4] The long delay in trial was due to a number of factors. Respondent filed numerous *pro se* motions, changed counsel four times and underwent two psychiatric examinations to determine his mental competency. The trial was also continued

fore, an F.B.I. agent together with the prosecutor visited Mrs. Paugh, Mrs. Major and Mrs. Apple. The prospective witnesses were shown five color photographs, including one of respondent and Bailey. Only the picture of respondent and Bailey were full length and bore police identification numbers. Each of the witnesses picked out respondent's photograph as resembling the gunman but again none of the witnesses was able to make a positive identification and none of them selected Bailey's photograph (App. 29-31, 33-34). The next morning, prior to trial, the agent showed the same set of photographs to Mr. Taylor, who could not make an identification (App. 31). A lineup was not held. Defense counsel was not present at the photographic display on May 7 and 8, 1968.

The district judge held a pre-trial hearing to determine the admissibility of the prospective identification testimony. Without deciding whether the showing of the color photographs was impermissibly suggestive, the judge ruled that the government had established by "clear and convincing evidence" that the in-court identifications had an independent basis and therefore could be made in the presence of the jury (App. 63-64). At the trial, Mrs. Paugh, Mrs. Major, and Mr. Taylor were only able to identify

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several times because of the unavailability of government counsel (Pet. App. A, 4a, n. 3). The court of appeals declined to decide, due to the inadequacy of the record, whether respondent had been denied his right in a speedy trial (Pet. App. A, 26a). The court directed that a hearing on this issue be held prior to any retrial (Pet. App. A, 26a).

respondent as the gunman, although they testified that they were not absolutely sure of the identification (App. 79-80, 85, 89-90, 93). Mrs. Apple positively identified both respondent and Bailey (App. 99, 110).[5]

The original photographic identifications of respondent on February 3, 1966, were brought out in the pre-trial hearing but never came before the jury at trial. The showing of colored photographs to the four eye-witnesses was not brought out during the government's case. The defendant Bailey, however, called the F.B.I. agent who had shown the photographs to Mrs. Apple, the only witness who positively identified both respondent and Bailey at the trial. After the agent testified that Mrs. Apple identified one of the color photographs (a photograph of respondent) "as the man who was engaged in the hold-up" (App. 127) and had failed to identify the person in one of the other color photographs (a photograph of Bailey), Bailey's counsel offered Bailey's photograph (Defendant's Exhibit No. 4) into evidence (App. 127).

The prosecutor then asked that the photograph of respondent, which Mrs. Apple said she identified, also be admitted into evidence. Respondent's counsel objected to the admission of this photograph (App. 128). Bailey's counsel then withdrew the offer. Sub-

[5] The government also introduced testimony from one McFarland, an informant, that respondent had asked him to help rob the bank, and that the day after the robbery respondent had told him that he robbed the bank with Bailey.

sequently both the prosecutor and counsel for Bailey again asked that the two photographs be admitted (App. 130). Although respondent's counsel again indicated that he opposed this (App. 130), all five photographs shown by the agent to Mrs. Apple on May 7, 1968, were admitted on stipulation of counsel, after the trial court indicated he would admit them regardless of whether Bailey's counsel or the prosecutor offered them into evidence (App. 130-131).*

2. The court of appeals declined to decide whether the showing of the color photographs was impermissibly suggestive and whether the district court's finding that the witnesses had an independent basis for their identification testimony was correct (Pet. App. A, 10a-11a). While noting that it would, if necessary, have remanded the case for "a more thorough hearing and more definite findings" on the former issue and for further "elucidation by the trial court of the basis of its ruling" on the latter issue (Pet. App. A, 11a, 25a, n. 20), the court ruled that reversible error had occurred in the admission of evidence of the identification made from the color photographs. In reaching this conclusion, it held broadly that, under the principles of *United States* v. *Wade*, 388 U.S. 218, an accused in custody, subject to cer-

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*The majority and dissenting judges below disagreed whether respondent's counsel had initially raised a proper objection to the introduction of all five photographs, and whether respondent's counsel waived any threshold objection by agreeing to the stipulation that all five photographs would be admitted (Pet. App. A, 7a, 63a-65a).

tain possible limitations, has the right to have counsel present at a government display of photographs to prospective witnesses of the offense for which the accused is in custody (Pet. App. A, 14a).[7] The court ruled that on retrial, therefore, the government would have to establish "by clear and convincing evidence" that the in-court identification of each witness was "based upon observations of the suspect" other than at the photographic displays. *United States* v. *Wade*, *supra*, 388 U.S. at 240.

SUMMARY OF ARGUMENT

In *United States* v. *Wade*, 388 U.S. 218, this Court held that a defendant in a criminal case is entitled to the assistance of counsel at a "confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit [an] identification," 388 U.S. at 288. Confrontations at lineups were found to be peculiarly susceptible to suggestive influences which create a grave risk of mistaken identification. Since these suggestive influences are often present in "many subtle ways," it is ordinarily impossible for a defendant to attack the in-court identification by demonstrating to a judge and a jury

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[7] The possible exceptions mentioned by the court were (1) where the delay in securing the attendance of counsel would jeopardize the progress of a continuing investigation or (2) where the photographic showing comes after a valid lineup or other confrontation consistent with *Wade* (Pet. App. A, 98a). See *United States* v. *Hines*, 455 F. 2d 1317 (C.A.D.C.); *United States* v. *Brown*, No. 24,452, opinion filed March 1, 1972 (C.A.D.C. *en banc*) (Pet. App. B).

any impropriety which may have been present at the lineup. 388 U.S. at 229-230.

Neither of the two bases of decision in *Wade*—that the lineup involves a stage of the prosecution in which (1) the accused is a participant, and in which (2) the presence of counsel is necessary to preserve his right to a fair trial—is involved in identification.

A. There are substantial differences between a forced confrontation at a lineup and a display of photographs to a witness. At a line-up there is a clear potential for improper suggestion in the lighting used, the demeanor, appearance, and physical characteristics of the other participants as compared with the accused, the clothing worn by the accused as well as the words he may be required to speak. The inability of unschooled witnesses and uncounseled defendants to detect "suggestive influences" under these circumstances is apparent, 388 U.S. at 230.

A photographic display does not involve the kind of subtle and undetectable influences present at a lineup. At such a display the accused is not present and the witness observes only static poses of the subjects in an atmosphere not marked by the tension present during an emotional confrontation with the defendant. While a photographic display may also be subject to subjective influences, arising out of the nature of the photographs used in array or suggestive comments by law enforcement officials, any impropriety present can easily be reconstructed by preserving the photographs and examining the witness. Accordingly, all the courts of appeals which have

decided the issue, with exception of the Court of Appeals for the District of Columbia Circuit, and the overwhelming majority of State appellate courts, have held that the holding in *Wade* is inapplicable to photographic displays.

B. The second factor common to all cases which have extended the Sixth Amendment's guarantee to various pre-trial stages—the need for the presence of counsel to insure the defendant a fair trial—is also lacking here. The photographic display essentially involves only an interview between a law enforcement officer with a witness; the interview does not involve a "confrontation compelled by the State between the accused and the victim or witness" (*Wade*, 388 U.S. at 228).

The Sixth Amendment guarantee of counsel does not apply to such interviews with witnesses at which the defendant is not present and has no legal right to participate. The cases expanding the right to counsel guarantee have emphasized "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463. While the right to counsel has been extended to formal and informal pretrial proceedings at which the accused is a participant and in need of counsel to assist him in exercising his rights, no case has yet held the Sixth Amendment applicable to proceedings at which the defendant is not a participant.

There are no compelling reasons requiring such an extraordinary expansion of the Sixth Amendment to interviews with witnesses at which photographs are displayed. While such displays may be subject to suggestivity which may improperly influence an in-court identification, they are no more subject to impropriety than ordinary interviews with key prosecution witnesses. Moreover, given the availability of the photographs and the opportunity to cross-examine witnesses at pre-trial hearings with respect to what took place when the photographs were displayed, there is far less potential for impropriety going undetected in such cases than in cases involving improper suggestion at interviews which do not involve photographic displays.

ARGUMENT

The Sixth Amendment does not require that counsel be present at a pre-trial photographic identification procedure

The Sixth Amendment mandate that in all criminal prosecutions the accused shall "enjoy the right * * * to have the [effective] assistance of counsel for his defense" has been held applicable not only to the trial itself but to "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U.S. 218, 224; *Hamilton* v. *Alabama*, 368 U.S. 52, 54; *Massiah* v. *United*

States, 377 U.S. 201.* The right to counsel has thus been held applicable to post-indictment interrogations (*Massiah* v. *United States*, *supra*) and "confrontation[s] compelled by the State between the accused and the victim or witnesses to a crime to elicit [an] identification." *United States* v. *Wade*, 388 U.S. at 288. These instances are limited exceptions which this Court has permitted to our adversary system of criminal law enforcement under which the government conducts its preparation for trial without participation by defense counsel.

The court below created another exception which we believe to be unwarranted. It held that the pretrial photographic display here "was like a lineup * * * a critical stage of the prosecution, requiring the presence of counsel for Ash, within the meaning of *Wade*" (Pet. App. A, 12a). The court's characterization of the photographic display as a "critical stage" of the prosecution reflected, we believe, a basic misapprehension of the nature of photographic identifications, the crucial differences which distinguish this procedure from a lineup, and an erroneous view of the reach of the Sixth Amendment's right to counsel guarantee as defined in *Wade* and other cases.

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* Compare *Kirby* v. *Illinois*, No. 70-5061, decided June 7, 1972, holding that the Sixth Amendment guarantee, as it language suggests, is applicable only after the commencement of a "criminal prosecution" by "the initiation of adversary judicial criminal proceedings" (Slip Op. p. 7).

A. *The holding in* United States v. Wade, *388 U.S. 218, that the Sixth Amendment right to counsel applies to a police lineup, should not be extended to cover a pre-trial display of photographs to a witness.*

The holding in *Wade* requiring the presence of counsel at lineups came after careful scrutiny of that pre-trial confrontation "to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself" (388 U.S. at 227). Lineups were found to be peculiarly susceptible to many suggestive influences which, due to the nature of the confrontation and the conditions present, could seldom be reconstructed at trial. As the Court observed (388 U.S. at 230-231):

> Those participating in a lineup with the accused may often be police officers; in any event, the participants' names are rarely recorded or divulged at trial. The impediments to an objective observation are increased when the victim is the witness. * * * In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers.

The inability of the accused to "reconstruct at trial any unfairness that occurred at the lineup," the Court held, tended to deprive the defendant of his only real opportunity to attack the credibility of the witness' courtroom identification (388 U.S. at 232). The presence of counsel, principally as an observer, or the adoption of regulations which "eliminate the risks of abuse and unintentional suggestion at lineup[s] * * * and impediments to meaningful confrontation at trial" (388 U.S. at 239), was held to be essential to protect an accused from the "many variables and pitfalls" against which he was required to stand "unprotected" (388 U.S. at 235).*

The holding in *Wade* thus rests on two principal grounds: the lineup involves a stage of the prosecution in which the accused is a participant and in

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*The Court in *Wade* also suggested that the "presence of counsel itself can often avert prejudice" to the defendant and prevent "the infiltration of taint in the prosecution's identification evidence" (388 U.S. at 236, 238). But the holding in the case did not turn on this somewhat speculative collateral "benefit." Compare *Gilbert* v. *California*, 388 U.S. 263, holding that counsel was not required when handwriting exemplars were taken from the accused. While it was there acknowledged that "an unrepresentative exemplar" might be taken, this fact could be "brought out and corrected through the adversary process at trial" (388 U.S. at 267). See also, *United States* v. *Wade*, *supra*, 388 U.S. at 227-228, holding that counsel was not required at such preparatory steps "as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair and the like" because "[k]nowledge of the techniques of science and technology is sufficiently available * * * that the accused has the opportunity for a meaningful confrontation * * * at trial through the ordinary processes of cross-examination * * * and the presentation of the evidence of his own experts."

which the presence of counsel is necessary to preserve his right to a fair trial. A photographic identification, unlike a lineup, does not involve either of these factors.

B. *Unlike a police lineup, a photographic display does not involve the possibility of suggestive influences whose presence cannot be fully discovered at the trial.*

There are substantial differences between a forced confrontation at a lineup and a display of photographs to a witness. As Judge Wilkey observed in his dissenting opinion below, a lineup is a "little drama" stretching over an appreciable span of time. "The accused is there in the flesh, three-dimensional and always full-length" (Pet. App. A, 29a). Moreover, the accused is not merely present but may be required to move about, perform certain acts, don particular clothing, or speak the identical words used during the commission of the offense. While this transpires the witness, often nervous and afraid of being spotted by the perpetrator of the crime, observes the subject at close range sometimes performing the very acts the criminal did during the perpetration of the crime. See *People* v. *Lawrence*, 4 Cal. 3rd 273, 278, 481 P. 2d 212, 215 (Sup. Ct., *en banc*), certiorari denied, No. 70-352 (June 12, 1972). The potential for improper suggestion is present in the lighting used, the demeanor, appearance, and physical characteristics of the other participants as compared to those of the accused, the clothing worn by the accused as well as the words he may be required to

speak. Wall, *Eye-witness Identification in Criminal Cases*, pp. 55-63. The inability of "unschooled" witnesses and "uncounselled" defendants at these emotionally unsettling confrontations to reconstruct "suggestive influences" is apparent. *United States* v. *Wade*, *supra*, 388 U.S. at 230.

By contrast a photographic display involves none of these subtle and undetectable influences. As the Supreme Court of California observed:

> At photographic identification proceedings, however, the accused is not present and the witness observes only static poses of those pictured. When mug shots are used the witness is presented with only a collection of faces. Such a witness does not observe the suspect repeat actions or hear the accused speak. [*People* v. *Lawrence*, *supra*, 4 Cal. 3rd at 278, 481 P. 2d at 215.]

Despite these differences, photographic displays may be subject to suggestive influences (*Simmons* v. *United States*, 390 U.S. 377, 383). But while the opinion in *Wade* spoke of the danger of suggestion at lineups being present "in many subtle ways," which may not be capable of reconstruction at trial (388 U.S. at 229, 236), only "[t]hree types of suggestion" have been mentioned as possible during photographic displays:[10] (1) the type of photographs used, *i.e.*, if the photo of the defendant is markedly different from the others;[11] (2) the manner in which

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[10] Note, *Criminal Procedure-Photo-Identifications*, 43 N.Y.U. L. Rev. 1019, 1021-1022 (1968).

[11] Wall, *Eye-witness Identification in Criminal Cases*, pp. 81-82.

the photographs are spread out or handed to the witness; and (3) suggestive comments or gestures, by law enforcement authorities, *i.e.*, pointing out a suspect's picture or asking whether a suspect's picture is that of the perpetrator.[12]

These "three types of suggestion" are not very subtle as compared to those potentially present at lineups. Moreover, the availability of the photographs displayed permits a complete "reconstruction" of exactly what occurred at the display including any "suggestion" resulting from the character of the photographs themselves or the way they were shown to the witness. Additionally, the circumstances under which photographs are displayed—frequently at the home or place of business of the witness—enhance the likelihood that the witness will readily recollect at trial any impropriety involved in the display. All the witness need do is to "focus at that time on one thing only, the photographs, and be able to recall only one additional thing, any hint of suggestion in the way the photos were displayed or in the conversation of the official conducting the interview" (dissenting opinion of Judge Wilkey, Pet. App. A, 30a).[13]

The reported cases reflect the ease with which witnesses have been able to reconstruct any sugges-

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[12] Williams & Hammelman, *Identification Parades-I*, 1963 Crim. L. Rev. (Eng.) 479, 484; Comment, 2 U.C.L.A. L. Rev. 552, 554.

[13] In this case the photographic identifications were made in the witnesses' places of business or homes (Pet. App. A, 30-a).

tivity present as a result of the type of photographs used,[14] the manner in which the photographs were displayed, and comments made by law enforcement officials during the course of the interview with the witness.[15] Indeed, the majority opinion in the court below, which develops at length the alleged impropriety present in photographic displays, provides a clear example of the reconstructability of those displays. On the basis of the evidence adduced at the suppression hearing, the court of appeals was able to give the following description (Pet. App. A, 9a):

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[14] See, *e.g.*, *United States* v. *Fernandez*, 456 F. 2d 638, 641 (C.A. 2), holding improper an array in which only one of six photographs bore a resemblance to the description of a suspected bankrobber; *United States* v. *Zeiler*, 427 F. 2d 1305, 1308 (C.A. 3), holding improper an array of photographs, three of which were of the defendant in ordinary poses wearing glasses—which fit the description of the suspect—while the other five were mug shots of subjects pictured without glasses; *People* v. *Slutts*, 259 Cal. App. 2d 886, 66 Cal. Rptr. 862, holding improper an array which included a photograph of the defendant on which the police officer, prior to displaying the photographs, drew in a beard to conform to the witness' description of the criminal as wearing a beard.

[15] See, *e.g.*, *United States* v. *Trivette*, 284 F. Supp. 720 (D. D.C.) holding improper a police official's question whether a particular photograph was that of the man who committed the crime, but approving the manner in which the photographs were displayed; compare, *Saville* v. *United States*, 400 F. 2d 397 (C.A. 1), where the police officer was merely quoted as asking the witness to look at the photographs and identify the perpetrator of the crime. See also, *State* v. *Fullen*, 404 P. 2d 732 (Ariz.); *Hernandez* v. *State*, 255 A. 2d 449 (Md.); *State* v. *Moore*, 435 S.W. 2d 8 (Mo.), each of which discusses the propriety of various comments by police officers at suppression hearings, which were described by the witnesses.

> As to the May 1968 identifications, from color photographs shown on the eve of trial, the pictures are present in the record before us. It will be recalled that the only description at the time of arrest was in terms of being tall and of thin build. The color photographs in the record show that both Ash and Bailey are tall and slender, while the other three men whose photographs were used appear to be of stocky build. Despite the witnesses' reliance at the time of the crime on description in terms of bodily characteristics, only Ash and Bailey are pictured full-length; the other three subjects are cut off at mid-thigh, waist, and mid-chest, respectively. Finally, the photographs of Ash and Bailey, shown standing next to height poles, bear police identification numbers, while there are no such numbers on the other three photographs.[16]

It is thus readily apparent that one of the crucial circumstances which rendered the lineup a critical stage of the proceeding—the inability of the defend-

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[16] The issue whether the photographs were impermissibly suggestive, as earlier noted (*supra*, p. 6) was not resolved by either court below. The district court did not reach the issue because of its holding that the prosecution had established by "clear and convincing evidence" that the in-court identifications were based on observations of the suspect other than the photographic display (App. 63-64). The court of appeals did not reach the issue because of its Sixth Amendment holding, but indicated that it would have remanded for "a more thorough hearing and more definite findings" on what it characterized as the "substantial claim of impermissible suggestiveness" (Pet. App. A, 11a). If the Court agrees with our submission that the basis of the court of appeals decision was erroneous, then this issue would have to be resolved on remand.

ant "to reconstruct at trial any unfairness that occurred at the lineup"—is not present to any significant extent in photograph displays and the defendant is not entitled to the presence of counsel. As the Court of Appeals for the Third Circuit held in *United States ex rel. Reed* v. *Anderson*, No. 71-1816 (April 11, 1972) (S. App. 12a):

> If, as here, the identification is not in a live lineup at which defendant may be forced to act, speak or dress in a suggestive way, where the possibilities for suggestion are multiplied, where the ability to reconstruct the events is minimized, and where the effect of a positive identification is likely to be permanent, but at a viewing of immobile photographs easily reconstructible, far less subject to subtle suggestion, and far less indelible in its effect when the witness is later brought face to face with the accused, there is even less reason to denominate the procedure a critical stage at which counsel must be present.[17]

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[17] The earlier opinion of the Court of Appeals for the Third Circuit, relied upon by the majority below, *United States* v. *Zeiler*, 427 F. 2d 1305, was overruled in *United States ex rel. Reed* v. *Anderson*, *supra*, (S. App. 12a). Judge Gibbons, who concurred in the holding in *Reed* that the Sixth Amendment does not require the presence of counsel at photographic displays, suggested that such a requirement be imposed in the exercise of the court's supervisory powers (S. App. 27a). That proposal seems inconsistent with 18 U.S.C. 3502, which governs the admissibility of in-court identifications and which was enacted following the decision in *Wade*. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 53. The expression of Congressional intent should not only be considered before *Wade* is extended to a photographic identification but would also seem to pre-

Accord: *United States* v. *Bennett*, 409 F. 2d 888 (C.A. 2), certiorari denied *sub nom. Haywood* v. *United States*, 396 U.S. 852; *United States* v. *Ballard*, 423 F. 2d 127 (C.A. 5); *United States* v. *Serio*, 440 F. 2d 827 (C.A. 6); *United States* v. *Gornick*, 448 F. 2d 566 (C.A. 7), certiorari denied, 404 U.S. 861; *United States* v. *Long*, 449 F. 2d 288 (C.A. 8), certiorari denied, 405 U.S. 974; *United States* v. *Smith*, 423 F. 2d 1290 (C.A. 9), certiorari denied, 398 U.S. 930; *Rech* v. *United States*, 410 F. 2d 1131 (C.A. 10), certiorari denied, 396 U.S. 970; *People* v. *Lawrence*, *supra*, 4 Cal. 3rd 273; *Brokenbrough* v. *State*, 287 A. 2d 657 (Del.); *Staten* v. *State*, 248 So. 2d 697 (Fla. App.); *People* v. *Martin*, 265 N.E. 2d 685 (Ill.), certiorari denied, 403 U.S. 921; *Williams* v. *State*, 275 A. 2d 522 (Md.); *Commonwealth* v. *Gerasway*, 245 N.E. 2d 423 (Mass.), certiorari denied, 396 U.S. 911; *Stevenson* v. *State*, 244 So. 2d 30 (Miss.); *State* v. *Moss*, 191 N.W. 2d 543 (Neb.);

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clude the adoption of a rule in the exercise of the Court's supervisory powers which would make the admissibility of in-court identifications dependent upon the procedures employed at photographic displays. See *McNabb* v. *United States*, 318 U.S. 332, 341, n. 6. Compare *Simmons* v. *United States*, *supra*, 390 U.S. at 384. While here the basis of reversal was that evidence of a prior photographic identification was admitted, the effect of the holding requiring the presence of counsel at photographic displays goes much further than precluding evidence of identifications made at such displays. An in-court identification following a "defective" photographic identification would be admissible only upon a showing "by clear and convincing evidence" that the in-court identification of such witness was "based upon observations of the suspect" other than at photographic displays. See *United States* v. *Wade*, *supra*, 388 U.S. at 240.

People v. *Spinks*, 326 N.Y.S. 2d 261 (S. Ct. App. Div.); *State* v. *Stepney*, 185 S.E. 2d 844 (N.C.); *State* v. *Nettles*, 492 P. 2d 567 (Wash. App.); *Kain* v. *State*, 179 N.W. 2d 777 (Wisc.); contra: *Cox* v. *State*, 219 So. 2d 762 (Fla. App.); *People* v. *Adams*, 172 N.W. 2d 547 (Mich. App.); *Commonwealth* v. *Whiting*, 266 A. 2d 738 (Pa.), certiorari denied, 400 U.S. 919; *Thompson* v. *State*, 451 P. 2d 704 (Nev.).[18]

C. ***The presence of counsel at a photographic identification is not required in order to preserve the defendant's right to a fair trial.***

The second factor common to all cases which have extended the Sixth Amendment's guarantee to various

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[18] Compare *United States* v. *Brown*, C.A.D.C., No. 24,452, opinion filed March 1, 1972 (Pet. App. B), in which the court below, *en banc*, held that counsel for the defendant was not required to be present at an interview conducted by the prosecutor with a witness who was shown a photograph taken of a lineup at which she was not able to make an identification. Counsel for the defendant was present at the lineup. The court held that counsel was not required at the interview because (1) the photograph was merely a "completely neutral and wholly exact reproduction [of the lineup at which counsel was present]" and (2) the possibility of suggestion in displaying the photograph was minimized by the "professional responsibilities * * * of the prosecuting attorney, and the defense counsel's right of cross-examination" (Pet. App. 98a). See, also, *United States* v. *Collins*, 416 F. 2d 696 (C.A. 4) holding that counsel is not required, at a display of the photograph of a lineup to witnesses who were unable to attend the lineup at which defendant was represented by counsel; *United States* v. *Evans*, 459 F. 2d 481 (C.A. 4), pending on petition for a writ of certiorari, No. 71-6746, holding that an accused in custody is not entitled to counsel at a photographic display to a witness to a crime unrelated to that for which he was incarcerated.

pre-trial steps—the need for the presence of counsel to insure the defendant a fair trial—is also lacking here. The photographic display essentially involves only an interview between a law enforcement officer and a witness; the interview does not involve "a confrontation compelled by the State between the accused and the victim or witnesses" (*United States* v. *Wade*, *supra*, 388 U.S. at 228). The accused is not present and does not have any legal right to be present, at such interviews.

The early cases extending the Sixth Amendment's guarantee were based upon "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with the power to take his life or liberty * * *." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463; see also *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345; *Powell* v. *Alabama*, 287 U.S. 45, 68-69. While subsequent cases have recognized the necessity of counsel at both formal and informal proceedings other than the trial itself, those decisions have stressed the necessity for counsel "to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proffered." *United States* v. *Bennett*, *supra*, 409 F.2d at 900. None of those decisions involved proceedings at which the defendant himself was not a participant. See, *e.g.*, *Coleman* v. *Alabama*, 399 U.S. 1, 9, extending the right to counsel to preliminary hearings where "the guiding hand of counsel * * * is essential to protect the indigent accused against an erroneous or improp-

er prosecution"; *Hamilton* v. *Alabama*, 368 U.S. 52, and *White* v. *Maryland*, 373 U.S. 59 extending the right to counsel to arraignments where "[a]vailable defenses may be * * * irretrievably lost if not then and there asserted" (368 U.S. at 54) and where counsel is essential to enable the accussed "to plead intelligently" (373 U.S. at 60); *Massiah* v. *United States*, 377 U.S. 201, extending the right to counsel to post-indictment interrogation of the accused; see also, *Mempa* v. *Rhay*, 389 U.S. 128; *In re Gault*, 387 U.S. 1.

These decisions, as the Court held in *Wade*, reflect the principle "that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal, informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial" (388 U.S. at 226).[19] But unlike

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[19] The Court in *Wade* made repeated reference to "confrontation" between the accused and the witnesses at a lineup. After discussing "critical confrontations of the accused," 388 U.S. at 224, and "pre-trial confrontation" and "meaningful confrontation," 388 U.S. 227, the Court focused on the "confrontation compelled by the State between the accused and the victim or witnesses," 388 U.S. at 228, and stated, "The pretrial confrontation for purpose of identification may take the form of a lineup * * * or presentation of the suspect alone to the witness * * *," (388 U.S. at 229). By contrast the Court recognized that display of photographs to witnesses was commonplace and held that one of the ways the prosecution could overcome the taint of an improperly conducted lineup was to show an "identification by picture of the defendant prior to the lineup," 388 U.S. at 241. There was no suggestion that counsel was required when such an identification was made. See, also, *Simmons* v. *United States*, 390 U.S. 377, 384.

Wade and the other cases, the accused here was not required to "stand alone" at the interviews that took place between the witnesses and the prosecutor. And, as Chief Judge Friendly observed in *United States* v. *Bennett*, *supra*, 409 F.2d at 899:

> [T]o require that defense counsel be allowed or appointed to attend [such] out-of-court proceedings where the defendant himself is not present would press the Sixth Amendment beyond any previous boundary. * * *

See also, *United States ex rel. Reed* v. *Anderson*, *supra* (S. App.); *United States* v. *Serio*, 440 F.2d 827 (C.A. 6); *People* v. *Lawrence*, *supra*, 4 Cal. App. 3rd 273, 481 P. 2d 212.

There are no persuasive reasons for such an extraordinary extension of the Sixth Amendment. As we have already shown, the potential for impropriety that is alleged to be present in photographic displays is readily capable of reconstruction at trial; and where such impropriety is shown to have taken place, a remedy is available (see *supra* pp. 14-19). Moreover, "[m]any other aspects of the prosecution's interviews with a victim or a witness to a crime afford just as much opportunity for undue suggestion as the display of photographs; so, too, do the defense's interviews, notably with alibi witnesses" (*United States* v. *Bennett*, *supra*, 409 F.2d at 900). Yet it has never been held that counsel for a defendant has a right to be present at such interviews or that the preparation of a witness for trial is a "critical stage" of the proceeding.

On the contrary, under our adversary system "the State is entitled to investigate and develop its case outside the presence of defense counsel. This includes the right to have private conversations with identification witnesses, just as defense counsel may have his own consultations with these and other witnesses without having the prosecutor present" (*United States* v. *Wade*, *supra*, 388 U.S. 259, dissenting opinion of Mr. Justice White). Such interviews as well as other stages in trial preparation should not and need not be encumbered or hindered by the presence of a defense lawyer.[20]

The court below, however, suggested that a "crucial distinction" should be drawn between photographic identifications and ordinary interviews with witnesses because "[t]he prosecutor cannot introduce testimony on direct of the statements given by a witness in an earlier interview * * * [while] he may introduce the

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[20] The reluctance of many citizens to become involved in criminal trials as witnesses is a problem which law enforcement authorities constantly face. The problem will only be further compounded if pretrial proceedings, such as interviews with the prosecutor, are transformed into quasi-adversary proceedings with defense counsel "hover[ing] over witnesses and beginn[ing] their cross-examination." (*United States* v. *Wade*, 388 U.S. 259, dissenting opinion of Mr. Justice White). Moreover, some witnesses may refuse to participate because of fear for their own safety if their identity is disclosed at an early date. This is particularly so where crimes of violence are concerned. The very actions necessary to conceal identity at lineups which were suggested in *Wade* (388 U.S. at 238, n. 28)—such as masking the witness—can only add to the disruptive effect on ordinary interviews and perhaps compound the witness' fears.

witness's prior identification" (Pet. App. A, 16a-17a). But prior consistent statements are generally admissible when offered "to rebut an express or implied charge against him of recent fabrication or improper influence or motive." *Revised Proposed Rules of Evidence for United States Courts and Magistrates*, 51 F.R.D. 315, Rule 801(d); IV Wigmore, *Evidence* §§ 1129-1130 (3d ed.) and cases cited. Charges of recent fabrication and the like are frequently leveled at such key prosecution witnesses as accomplices or informers.

Moreover, far more protection against impropriety is afforded in cases involving photographs because of the ease with which impropriety may be rooted out and because of the procedures followed prior to the admission of evidence of a pre-trial identification. Before such evidence is admitted the defendant may cross-examine the identification witnesses. "Armed with this information, defense counsel at trial knows precisely where to attack the prosecution's evidence, where to press the cross-examination, where to tread lightly or not at all. In regard to no other phase of the prosecution's case does the defense have these opportunities and advantages." (Dissenting opinion of Judge Wilkey, Pet. App. A, 32a-33a).

The evidence of the prior photographic identification in the instant case was admitted after a pre-trial hearing fully disclosed whatever improprieties were present as well as the potential points of defense attack. The pre-trial interview at which the photographs were displayed was shown to have been part

of the preparation of the witnesses for a trial that was to take place two years after the crime was committed. The display of photographs, as Judge Wilkey observed, "was part of counsel's testing their recollection of pertinent facts of the case before putting them on the stand for questioning" (Pet. App. A, 33a).

A prosecutor attempting improperly to influence the in-court identification could easily have given a verbal picture of the defendants and indicated to the witness, if they were not already aware of the fact, that both defendants would be seated at the defense table. The prosecutor here instead took the risk that the witnesses would not be able to make an identification when the photographs were displayed and that the defendants would then be able to use this information in attacking any in-court identification that might be made. The presence of counsel at the display would not have resulted in a more meaningful reconstruction of the alleged impropriety than was accomplished by the production of the photographs; nor would a rule requiring the presence of counsel have prevented a prosecutor intent on improperly influencing the in-court identification from finding a way to do so.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded to that court for consideration of the other issues it left undecided.

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